Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Petitioner,

v.

LOCKHEED-MARTIN CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner-Plaintiff brought suit individually and on behalf of the United States under the *qui tam* provisions of the False Claims Act against Respondents Lockheed Martin Corporation and its subsidiaries and related entities seeking recovery of in excess of $150 Million defrauded from the public fisc by false and fraudulent claims presented to and paid by the Department of Veterans Affairs. The district court limited its review to causes of action arising out of false representations and characterized Lockheed's actions as routine breaches of contract. The district court rejected the implied certification theory of liability recognized in other circuits and dismissed Petitioner's suit, without leave for further amendment, finding that the Petitioner had not and could not state a claim under the False Claims Act on the facts presented. The appellate court affirmed, disclaiming the relationship between ethical violations and causes of action for presentment and payment of fraudulent claims under the False Claims Act.

The questions presented are:

1) Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court as to call for the exercise of this Court's supervisory power.

2) Whether the court of appeals abused its discretion and committed clear error in dismissing suit for relief under the False Claims Act for false and fraudulent claims submitted and paid pursuant to schemes primarily accomplished by corrupt relationships with former Presidential appointees including a former Acting Secretary of the Department of Veterans Affairs and government contractor.

3) Whether violations of public corruption laws, including 18 U.S.C. § 207 and 31 U.S.C. § 1352, which influence the Government to approve claims which otherwise would not have been approved and pay monies it otherwise would not have paid constitute fraudulent claims under the False Claims Act.

4) Whether accomplishing the goals of the False Claims Act requires a liberal interpretation of pleadings, and whether the balancing of Fed. R. Civ. P. 8(a) and Fed. R. Civ. P. 9(b) require greater care in weighing the sufficiency of allegations in a False Claims Act complaint.

LIST OF PARTIES TO THE PROCEEDINGS

1. The Petitioner-Relator, Joseph E. Garst.

2. Respondents are as follows:

a. Lockheed Martin Corporation, a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Martin Missiles and Space Co., Inc.; Lockheed Missiles and Space Co., Inc.; Lockheed Martin Information Management Services Co., Inc.; Lockheed Information Management Services Co., Inc.; Lockheed Martin Integrated Solutions, Co., Inc.; and Lockheed Integrated Solutions Co., Inc.

b. Lockheed Martin Missiles and Space Co., Inc. a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Martin Missiles and Space Co., Inc; Lockheed Martin Integrated Solutions Co., Inc; and Lockheed Integrated Solutions Co., Inc.

c. Lockheed Martin Information Management Services Co., Inc., a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a each of the following: Lockheed Information Management Services Co., Inc.; Lockheed Martin Integrated Solutions Co., Inc.; and Lockheed Integrated Solutions Co., Inc.

d. Lockheed Martin Integrated Solutions Co., Inc., a foreign, for profit corporation, individually and as parent, successor in interest and d/b/a Lockheed Integrated Solutions Co., Inc.

e. Lockheed Integrated Solutions Co., Inc., a foreign for profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Grady, D.J.), dismissing petitioners' Amended Complaint with leave to amend (Appendix ("Pet.App.") is published at 158 F. Supp.2d 816 (N.D. Ill., 2001). The district court's subsequent opinion ordering a more definite statement is not otherwise published. The district court's subsequent opinion dismissing petitioners' Third Amended Complaint with prejudice is published at 2002 WL 1794004 (N.D. Ill., 2002). The court of appeals' opinion (per Easterbrook, C.J., joined by Posner and Cudahy), affirming, is published at 328 F.3d 304 (7th Cir. 2003). The court of appeals' order denying rehearing and rehearing en banc is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 8, 2003, and denied rehearing and rehearing en banc on June 2, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, 31 U.S.C. § 1352(a)(1) and (b)(1), 18 U.S.C. § 207(a)(2) and (c) relevant to this petition are printed in the Appendix at 38a.

STATEMENT OF THE CASE

Petitioner-Plaintiff brought suit individually and on behalf of the United States under the *qui tam* provisions of the False Claims Act against Lockheed Martin Corporation and its

subsidiaries seeking recovery of in excess of $150 Million defrauded from the public fisc by false and fraudulent claims presented to and paid by the Department of Veterans Affairs. These claims arose under two Federal procurement programs for computer goods and services, which Lockheed promised tc provide pre-proven and pre-tested to contract specifications prior to presenting claims for payment. These programs were known as the National Office Automation, Veteran Affairs Progam and the Veteran Benefits Administration Modernization Program. As the computers and systems to be acquired would primarily be dealing with personal medical information, personal financial information and procurement or competition sensitive information, security specifications of the contract were key considerations. In its Best and Final Offer, Lockheed promised to provide systems rated to the Department of Defense C2 level of security. The National Office Automation, Veterans' Affairs program was funded with $298 million for ten years with Lockheed as the sole vendor. The contract was structured as an initial contract with nine renewable options. The Veterans Benefits Administration Modernization Program had a budget of $220 million.

By the end of 1992, the first full year of contract performance, the VA initially refused acceptance for non-conformance and denied payment of over $28 million in claims presented by Lockheed. Lockheed subsequently obtained payment of the entire $298 million in six years, using a multiplicity of fraudulent acts and schemes including bribery, presenting false claims for payment and obtaining payment of false claims by use of undue influence, public corruption and a death threat. Lockheed successfully subverted the matrix of protections provided to the Government by statutes, regulations, contract provisions and the loyal services of its employees, which was primarily accomplished through the use of undue influence by illegally engaging the services of "revolving door" Presidential appointees, including the former Acting Secretary

of the Department, as well as the VA's former Assistant Secretary of Finance.

Petitioner's pleadings set forth the false representations and fraudulent acts allowing Lockheed to receive public monies it otherwise would not have received with clarity and precision. For example, when in April of 1992, Lockheed's unpaid invoices totaled over $20 million, Lockheed responded by purchasing dinner tickets valued at $1,150 each for then Deputy Secretary Anthony Principi and several of his Senior Executive Service contracting assistants. The dinner was held in June, 1992. Within days, Lockheed wrote to one of Deputy Secretary Principi's assistants invited to the dinner and asked him to intervene and expedite payment of its unpaid invoices, even though Lockheed failed to obtain customer acceptance as required by the contract.

Throughout the contract performance, Lockheed maintained that its systems could meet critical contract requirements, such as security capability, when in truth and in fact, it knew it could not. Petitioner provided to the court, an internal Lockheed memorandum dated February 10, 1993, attached as Exhibit 45 to its Third Amended Complaint, in which a Lockheed chief engineer admitted that Lockheed's systems could not meet critical contract requirements and that it was just a matter of time until the government learned of the nonconformance of its delivered systems.

In a major project under the program, the Local Area Network/Wide Area Network for the Department's Office of Acquisition and Materiel Management, Lockheed never brought its promised computer network operational despite five years of testing and effort. This occurred despite Lockheed's representations in its Best and Final Offer that all systems were pre-proven and pre-tested prior to delivery. In over five years, Lockheed could never reproduce the successful network test results that it represented had been conducted. Millions of dollars

of equipment delivered by Lockheed was so defective that it was merely warehoused and finally discarded. Concurrently, millions of dollars in labor for system installation and implementation were expended without any benefit to the Government.

In August, 1993, nine months after Acting Secretary Anthony Principi left office, Lockheed recruited him to serve as a consultant to increase its sales and revenues under the National Office Automation, Veterans Affairs contract. This occurred despite the fact that Lockheed knew that Acting Secretary Principi was personally and substantially involved in both the National Office Automation, Veterans Affairs Program and the Veterans Benefits Administration Modernization Program. Lockheed further knew that the Department had determined to accomplish many of the goals of the Veterans Benefits Administration Program using the Lockheed National Office Automation, Veterans Affairs contract.

Petitioner pled with clarity and precision the ways in which Acting Secretary Principi was personally and substantially involved in these programs. Petitioner noted that in August of 1992, Deputy Principi summoned key opponents to the Lockheed contract to an executive session. He affirmed to them the Department's commitment to the program and the Lockheed contract and urged them to recognize the importance of the program. This occurred despite a memorandum from the Department Inspector General in April, 1992, notifying Department contracting officials that next generation computers were available under better terms and lower prices from an accessible Department of Defense contract. At a joint executive working session in August of 1992, Lockheed requested then Deputy Secretary Principi to serve as the ultimate arbiter of all disputes arising out of its contract.

Petitioner alleged that similarly, Lockheed knew that former Acting Secretary Anthony Principi had been personally and

substantially involved in the Veterans Benefits Administration Modernization Program. Former Acting Secretary Principi defended this program from opposition by Congressman John Conyers, sought to call off an investigation into the program by the Government Accounting Office and awarded a contract under the program over the protests of Congressman Conyers. Lockheed, through negotiations with the Department of Veterans Affairs, had obtained its commitment to accomplish significant portions of the goals of this program through the Lockheed contract.

Petitioner alleged that notwithstanding Lockheed's knowledge of former Deputy Secretary Principi's personal and substantial involvement in the two programs, it entered into a series of consulting and employment relationships with him to increase sales under the National Office Automation, Veterans Affairs contract. Petitioner provided copies of the consulting contracts with its pleadings. The first was cloaked by purporting to be a contract for legal services with a California law firm. The clear text of the contract, however, called for the personal services of Anthony Principi to increase revenues under the subject contract and to recruit "subject matter experts" to assist Lockheed with the contract.

In response to continuing resistance by Department finance personnel to issuing payment for Lockheed's invoices, former Deputy Secretary Principi recruited another Presidential appointee S. Anthony McCann, his former Assistant Secretary of Finance, to prepare a report for Lockheed concerning the subject contract. Former Assistant Secretary of Finance McCann was hired as a Lockheed consultant approximately nine months after leaving office. He also was personally and substantially involved in both programs. Former Assistant Secretary McCann summoned key VA executives, including a leading critic of the Lockheed contract, to the executive briefing wherein former Acting Secretary Principi urged them to continue to support the

Lockheed contract. Further, it was McCann's finance personnel, who continued to resist issuing payments to Lockheed for nonaccepted goods and services.

Petitioner alleged that significantly in September, 1993, concurrent with the initiation of the consulting relationships with former Acting Secretary Principi and former Assistant Secretary of Finance McCann, Lockheed's invoice for payment under a disputed program was paid in the amount of $1.3 million. Further, at the same time, Lockheed received an order for approximately $5.6 million of equipment under the National Office Automation, Veterans Affairs contract, in support of the Veterans Benefits Administration Modernization Program.

Petitioner pled the specifics of these relationships and attendant activities with clarity and precision, noting to the Court specific dates of meetings and lobbying activities. Petitioner was able to attach as exhibits copies of consultant contracts, invoices, plane tickets and checks issued. Expense invoices from Deputy Secretary Principi contained notations requesting compensation for "lobbying public officials" and "meeting attendance with VA."

In 1995, former Acting Secretary Anthony Principi was hired as the Chief Executive Officer of the Lockheed subsidiary with responsibility for the subject contract. Significantly, Petitioners alleged that in 1996 program funds under the National Office Automation, Veterans Affairs contract were exhausted. Anthony Principi tried and failed to have this contract extended. Following this failure, he resigned as a Lockheed official, noting in his letter of resignation that he had nothing more to contribute. Despite Lockheed's representations that it was capable of providing pre-proven and pre-tested technology, after six years and $298 million, Lockheed never produced the systems promised to operational requirements.

Petitioner voluntarily amended his original complaint upon substitution of counsel. The district court dismissed the First Amended Complaint primarily for failure to comply with Fed. R. Civ. P. 9, which requires that fraud be pled with particularity. Petitioner filed a Second Amended Complaint under seal in accordance with the provisions of the False Claims Act so that the Department of Justice could determine whether it would intervene. The Department of Justice declined to intervene. Following that determination, Petitioner, for the second time, voluntarily amended his complaint. This was done to limit the scope of the case in light of the limited resources available to Petitioner to prosecute the case without the assistance of the Department of Justice and to further enhance the specificity of the fraud alleged, consistent with the prior opinions of the district court. This Third Amended Complaint included ten counts. Among these counts were counts seeking recovery for the presentment and payment of false or fraudulent claims, the use of false records, a conspiracy count and separate enumerated counts for the submission and payment of false or fraudulent claims pursuant to the violation of procurement ethics statutes 18 U.S.C. § 207 and 31 U.S.C § 1352. This was done to assist the court in analyzing and handling the various bases of liability presented by Lockheed's conduct in violation of the False Claims Act.

The count under 31 U.S.C. § 1352 was considered particularly significant on its own. This relatively new statute was specifically designed to protect the public fisc from harm based upon improper lobbying activity — exactly what occurred in part in this case. In it pleadings, Petitioner alleged that the violations of this statute by Lockheed created implied certifications giving rise to liability under the False Claims Act. In argument before the appellate court, Petitioner noted that, given the statutory provisions, these certifications could more accurately be described as imputed by operation of law.

The Third Amended Complaint provided a table of contents (pages ii-v) which listed a glossary of acronyms in an appendix for ready reference by the court and parties if the definition of an acronym was missed in the reading of the body of the complaint. OA&MM is listed in the glossary among the other acronyms, and the glossary indicates where the acronym first appears in the complaint.

After reviewing the complaint, the district court directed the Petitioner to prepare a more definite statement to supply the specifics required by Fed. R. Civ. P. 9(b), and set out what the Petitioner had to put in that statement. The district court also required the Petitioner to indicate which paragraphs of the Third Amended Complaint related to which of the ten counts therein.

Petitioner prepared the More Definite Statement to supplement rather than replace the Third Amended Complaint with the specific facts that the district court requested and included references to specific paragraphs in the complaint that related to a particular count as the district court required. Petitioner provided all information requested concerning its conspiracy count.

The district court ignored the plain statutory language of the False Claims Act and the precedents of this Court; limited its review to causes of action arising out of false representations, and characterized Lockheed's actions as routine breaches of contract. The district court found the Petitioner's pleadings to be prolix, confusing and cumbersome. The district court acknowledged that a claim may have been stated in the total allegations presented by Petitioner. The court maintained, however, that it was not obliged to parse allegations to identify a claim. The court adopted a "shotgun pleading" theory proffered by Respondents by citation to two cases from the Eleventh Circuit. *Anderson v. District Board of Trustees of Central Florida Community College*, 77 F.3d 364, 366 (11th Cir. 1996)

and *Byrne v. Nezhat*, 261 F.3d 1075, 1130 n.108 (11th Cir. 2001). This theory apparently seeks to create an exception to the dismissal standard established by the precedents of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957); *Hishon v. King & Spalding*, 467 U.S. 69, 83 (1984); and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). In reality, this purported standard is so subjective as to be unmanageable. As demonstrated in this case, it allows for abusive application at the whim of the lower courts. Even though the case was at the very beginning stages of litigation, the district court noted as part of its rationale that Petitioner's pleadings would be impossible to present to a jury and were too lengthy and cumbersome to deal with.

The court also rejected the implied certification theory of liability recognized in other circuits and dismissed Petitioner's suit, without leave for further amendment, finding that the Petitioner had not and could not state a claim under the False Claims Act on the facts presented.

The appellate court affirmed, adopting the characterization of Lockheed's actions as routine breaches of contract, finding that the Petitioner had not properly alleged one false or fraudulent claim, holding that the courts did not have to read the allegations presented in pleadings if the pleadings were too lengthy to determine whether a claim could be made from the facts alleged, and disclaiming the relationship between ethical violations and causes of action for presentment and payment of fraudulent claims under the False Claims Act. In its opinion, the court of appeals described the Third Amended Complaint and the More Definite Statement as too lengthy, with too many acronyms.

REASONS FOR GRANTING THE PETITION

This petition should be granted for the following reasons:

First, the writ should be granted to honor the covenant between the nation and the men and women who have served, now serve and will serve in its Armed Forces. It is imperative that our veterans, as well as current and future servicemen and women know that the Government will redress the theft of hundreds of millions of dollars appropriated by Congress for their care. It is unacceptable for every Government official and institution charged with redressing this situation to do nothing.

Second, the writ should be granted because the actions of the Seventh Circuit Court of Appeals constitute both abuse of discretion and clear error, depart so far from the accepted and usual course of judicial proceedings, and have sanctioned such a departure by the district court as to call for the exercise of this Court's supervisory power.

Third, the Seventh Circuit's decision conflicts with holdings of this Court and other circuits in three important aspects. The decision defiantly disregards the repeated and recent precedents of this Court concerning the standard for dismissal with prejudice in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Conley v. Gibson*, 355 U.S. 41 (1957) and *Hishon v. King and Spalding*, 467 U.S. 69 (1984); and concerning the full scope of the False Claims Act. *United States v. Neifert White Co.*, 390 U.S. 228 (1968) and *Cook County v. U.S. ex rel. Chandler*, 123 S. Ct. 1239 (2003). Additionally, the decision refused to recognize the doctrine of implied certification, as held in *Shaw v. AAA Engineering*, 213 F.3d 519, 531-33 (10th Cir. 2002); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 2002 WL 31856364 (D.D.C. 2002). *See also U.S. ex rel. Siewick v. Jamieson Science and Engineering Inc.*, 214 F.3d 1372 (D.C. Cir. 2000).

Fourth, the writ should be granted because there exists today a clear and present danger to the public fisc. The two primary parties involved in the conspiracy which defrauded the public fisc of hundred of millions of dollars remain in power today. Anthony Principi, the former Acting Secretary of the VA and the co-conspirator with Lockheed, is the current Secretary of the Department. He presides over one of the largest budgets within the Executive Branch. Lockheed Martin remains today the nation's largest government contractor. A refusal by this Court to intervene will be viewed as a validation of a highly effective protocol for the piracy of public funds. The potential future consequences to the nation's financial well being are disastrous.

Fifth, the writ should be granted to protect the integrity of the country's reputation as a nation committed to the rule of law.

I. Intervention By This Court Is Necessary To Honor The Covenant Between The Nation And The Servicemen And Women Of The Armed Forces.

Unless this Court intervenes, the record will close with every Government official and institution responding to the theft of hundreds of millions of dollars appropriated for the care of veterans and their dependents by doing nothing. This is an unacceptable dereliction of duty to and breach of faith with the servicemen and women of the Armed Forces—past, present and future.

The interests of the nation and its veterans must be weighed against all other interests presented. It is unclear what interests compelled the appellate and district court to dismiss this suit without further leave to amend. The decisions do not clearly identify the specific reasons or rationale in the context of controlling precedent.

Petitioner responded to the directions of the district court in good faith. We ask this Court to take judicial notice of the fact that Petitioner's litigation team was expanded after the filing of the Second Amended Complaint to include a former Department of Justice strike force leader and former U.S. Attorney, with extensive experience in *qui tam* litigation. A primary reason for this expansion was to enhance Petitioner's ability to satisfy all of the court's expectations in the prosecution of this case.

There were other, less drastic methods available to the courts for addressing any continuing deficiencies with the Petitioner's pleadings. Any need to edit the pleadings does not outweigh the interests of the nation and its veterans in redressing a fraud which inflicted hundreds of millions of dollars of damage to the public fisc and the intended beneficiaries of the Congressional appropriation to the Department of Veterans Affairs.

II. Certiorari Is Warranted Because the Decision Below Conflicts With Decisions Of This Court And Other Circuits.

The Seventh Circuit's decision conflicts with holding of this Court and other circuits in three important aspects. The decision conflicts with the recognized basis for final dismissal of a complaint without leave to further amend. Second, the decision defiantly disregards the repeated and recent precedents of this Court concerning the full scope of the False Claims Act. Additionally, the decision refuses to recognize the doctrine of implied certification of false claims as recognized by other circuits. *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 531-533 (10th Cir. 2002) and *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 2002 WL

31856364 (D.D.C. 2002). *See also U.S. ex rel. Siewick v. Jamieson Science and Engineering,* 214 F.3d 1372 (D.C. Cir. 2000).

A. The Decision Below Conflicts With The Holding Of This Court And Other Circuits Concerning Basis For Dismissal Of A Complaint With Prejudice.

Prior decisions of this Court in *Hishon v. King & Spalding*, 467 U.S. 69, 83 (1984) and *Conley v. Gibson*, 355 U.S. 41 (1957), for example, have held that a court cannot dismiss a complaint under Fed. R. Civ. P. 12(b)(6) unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the plaintiff's complaint. The decision of the court of appeals conflicts with these holdings, as well as with the Seventh Circuit's own precedent in this regard. *Cook v. Winfrey*, 141 F.3d 322, 327 (7th Cir. 1998).

The lower court's decision also conflicts with this Court's precedent as to the sufficiency of a complaint under Fed. R. Civ. P. 8. In *Swierkiewicz v. Sorema, N.A.*, this Court explicitly held that a pleading is sufficient if it puts the defendant on notice as to the conduct with which he is charged.

The lower court's disregard of the classic rule of sufficiency of pleadings is best illustrated in its treatment of Petitioner's conspiracy count. Despite Petitioner's full compliance with all instructions noted by the district court, the court of appeals affirmed dismissal of this count. Neither the district court nor the appellate court articulated any specific deficiency in this count. The More Definite Statement contained the additional specific conspiracy allegations requested by the district court for Count III of the Third Amended Complaint. This statement described the agreement and acts in furtherance thereof and is paraphrased here.

The conspirators, including John Brophy, Dan Tellup and Vince Marafino of Lockheed agreed to illegally engage former VA officials to influence their former colleagues to extend the contract and get invoices for non-conforming goods and services paid by the VA. Anthony Principi and S. Anthony McCann, former VA officials, agreed to lobby VA officials to extend the contract and pay fraudulent invoices in return for monetary compensation. This agreement between Lockheed and Principi and McCann violated the Ethics in Government Act, 18 U.S.C. § 207(a)(2) and (c). The co-conspirators knew that Lockheed's certifications and warranties submitted with every claim for multi-user systems that the hardware and software performed in accordance with the specifications of the contract. The co-conspirators also knew that Lockheed billed for systems which did not contain C2 security as required by the contract, and that Lockheed unbundled, double billed and price gouged the VA. Acts in furtherance of the conspiracy, as alleged in Petitioner's complaint, include the following:

(1) On or about September 29, 1992, Lockheed's Dan Tellup, Robert a/k/a Vince Marafino, John Brophy, Ed Gund and others had a meeting and planned to hire VA Subject Matter Experts to influence and to lobby VA executives to grant extensions of the NOAVA Contract, to increase NOAVA sales, and to get paid the false claims Lockheed had presented to the VA.

(2) In or about August 1993, Lockheed's John Brophy met with Anthony J. Principi in Santa Clara, California.

(3) Between on or about August through November 1993, Lockheed's John Brophy, Ed Gund, Robert Downing and John McCarey executed a false covert agreement to pay to Adams Duque & Hazeltine $5,000 per month to provide consulting services of Anthony J. Principi.

(4) On or about September 1,1994, Anthony J. Principi sent a bill of $35,327.07 to Lockheed's Ed Gund for Principi's services lobbying VA executives and public officials.

(5) On or about November 1, 1993, S. Anthony McCann sent a letter from Silver Spring, Maryland to Lockheed's Ted Sieverson.

(6) On or about January 6, 1994, Lockheed manager Dennis Dougherty approved a $6,000 check to S. Anthony McCann in Silver Spring, Maryland.

(7) In or about August 1, 1994, Anthony J. Principi sent an invoice to Lockheed's Ed Gund in Washington, DC for his services under the covert consulting agreement for meeting in July 1994 with VA officials regarding the NOAVA contract and with fellow co-conspirators James DeWire and Al Zamberlan.

(8) In or about 1995, Lockheed's James Janssen threatened Tim Ortel, a former Lockheed subcontract administrator, that Ortel should not pursue auditing allegations of irregularities in labor rates of a Lockheed subcontractor charged to the NOAVA contract and paid for by the VA or else Mr. Ortel would find himself dead.

(9) On or about February 6, 1995, Lockheed's Ed Gund prepared a false payment voucher to Adams, Duque and Hazeltine of $25,000 for Anthony J. Principi's marketing of Lockheed's NOAVA contract with the VA, where the payment went directly to Mr. Principi.

(10) On or about May 17, 1995, Anthony J. Principi recently employed by Lockheed, sent a memo to Lockheed employee Ron Jury asking him to suppress the details of Principi's relationship with the VA contract while at the VA in a press release.

The complaint and the More Definite Statement also allege that a false claim was presented by T. A. Sieverson, an official of Lockheed, to Steve Stapleton, a Veterans Administration ("VA") government official, on April 9, 1993 and August 9, 1993 in the total amount of Two Million Five Hundred Eighty-Four Thousand Nine Hundred Twenty-Six Dollars and Four Cents ($2,584,926.04) for the equipment and services provided for Phase I and Phase II of the government contract for the Office of Acquisition and Material Management network project. The Lockheed official's cover letter certified that the claim was made in good faith and was accurate and complete. The More Definite Statement included evidence that Lockheed officials knew, prior to presentation of that claim, that the equipment failed to provide C2 security[1], password protection, multi-user access, dynamic linking, and adequate file locking as required by the contract, yet required payment in full for its claim. The contract mandated that Lockheed's act of presenting a claim was Lockheed's certification that the product was installed and operational and, further, warranted all items to perform in accordance with the contract's requirements. The contract required Lockheed to supply C2 security as part of the contract price. Lockheed's officials lied that the equipment they supplied to the VA provided C2 security and then fraudulently doubled-

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1. The panel misapprehended the materiality and importance of Appellees' clearly false representation that all Lockheed systems had a C2 level security rating. The panel stated, "Other parts of the complaint and statement suggest that the shortcoming that most concerns Garst is Lockheed's inability to make the network secure enough for the transmission of military secrets, though an outsider might suppose that a database of pensions and health benefits does not require quite that degree of sophisticated encryption." Panel decision at 6 The panel overlooked paragraphs 220-221 in the Third Amended Complaint which alleged that the VA required C2 security to protect individual personal medical information and procurement competitive bidding sensitive data. The panel also overlooked Appellant's allegation that Lockheed knowingly provided systems that could not provide even password protection.

billed the VA for an upgrade of the software that a Lockheed official falsely claimed in a letter this time really did provide C2 security, password protection, multi-user access, dynamic linking and file locking, when the contract required Lockheed to provide those material requirements at no additional contract cost.

During oral argument, the court of appeals directed Appellees' attention to the specific allegations of false representations contained on specific pages of the More Definite Statement. Appellees' counsel conceded the specificity of these allegations on the record, but claimed that they could not be linked to any claim or invoice. The panel overlooked the paragraph on page 15 of the More Definite Statement which specifically links this letter to the referenced claims. The panel also overlooked Paragraphs 177-178 of the complaint which specifically link similar specific false representations to Lockheed's claim for $1.3 million. As further examples, Claims 1 through 9 in the More Definite Statement are specific claims linked to Paragraphs 223-224 of the complaint describing Lockheed's false representations concerning C2 security. The panel did not address Petitioner's allegations that these falsehoods rendered specific claims, such as those set forth in Claims 1 through 20 listed in the More Definite Statement, false by operation of the implied certification theory. In this respect, the panel decision directly conflicts with the Tenth Circuit's holding in *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d at 531-533.

Section I, Summary of the Third Amended Complaint, gave an overview of Lockheed's false claims scheme and Plaintiff's legal theory that claims presented to the government were false because of Lockheed's certification that it had complied with the material contractual requirements when Lockheed knew that it had not. The specific section of the complaint which alleged the false and fraudulent invoice for $1,300,000, which was part of the $2,584,926.04, is set out on pages 57-68 of the complaint. The Petitioner's legal theory regarding Lockheed's false implied

certifications of compliance that induced the VA's payment of the claim is set out on pages 91-94 of the complaint.

The court of appeals decision is of extraordinary importance because it materially affects the fundamental rights of future plaintiffs' access to the judicial process to protect the public fisc through False Claims Act litigation. By applying a "shotgun pleading" theory to this case, the court of appeals creates an unmanageable burden on plaintiffs to balance the tensions among Rules 8, 9 and 12 in False Claims Act cases. This is particularly true as fraud is classically sophisticated, subtle and complex, and further is often provable only by circumstantial evidence. Necessary inferences require a full exposition of all supporting facts.

B. The Decision Below Conflicts With The Holding Of This Court And Other Circuits Concerning The Full Scope Of The False Claims Act.

The panel decision defiantly disregards the repeated and recent precedents of this Court holding that the False Claims Act reaches all types of fraud. *See United States v. Neifert-White,* 390 U.S. 228 (1968), and *Cook County v. U.S. ex rel. Chandler,* 123 S. Ct. 1239 (2003). In *Cook County v. U.S. ex rel. Chandler,* the U.S. Supreme Court reaffirmed its holding in *United States v. Neifert-White Co.* as to the broad scope of the False Claims Act. As this Court held, in the False Claims Act, "Congress wrote expansively, meaning 'to reach all types of fraud without qualification that might result in financial loss to the government.'" *Cook County v. U.S. ex rel. Chandler,* 123 S. Ct at 1246, citing *United States v. Neifert-White Co.,* 390 U.S. at 232. As discussed herein, by ignoring these holdings and the clear statutory language, the appellate court abused its discretion by finding that Petitioner failed to state a cause of action under the False Claims Act. Quite the opposite, the appellate court questioned, thereby directly rejecting, the significance of procurement the ethics violations alleged as hybrid causes of

action for the wrongful presentment or payment of false or fraudulent claims that the government otherwise would not have approved or paid.

C. The Decision Below Conflicts With The Holding Of Other Circuits By Failing To Recognize The Doctrine Of Implied Certification Of The False Claims Act.

The decision below conflicts with the theory of implied certification of the False Claims Act. The Plaintiff's legal theory regarding Lockheed's false implied certifications of compliance that induced the VA's payment of the claim is set out in the complaint. The legal theory is the same basis for Lockheed's liability as approved by the Tenth Circuit in *Shaw, supra,* 213 F.3d at 531-533. The specific substantive Count 1 of the complaint charges Lockheed with all of the elements of a violation of 31 U.S.C. § 3729(a)(1).

III. The Writ Should Be Granted Because The Actions Of The Seventh Circuit Court Of Appeals Constituted Both Abuse Of Discretion And Clear Error And So Far Departed From The Accepted And Usual Course Of Judicial Proceedings And Has Sanctioned Such A Departure By The District Court As To Call For The Exercise Of This Court's Supervisory Power.

As specified herein, the dismissal of Petitioner's complaint is an abuse of discretion, in that it is an inappropriate application of controlling legal precedent and principles as established by this Court. Further, the dismissal is clear error, as it conflicts with the record before the Court. The opinions issued do not reflect minimally acceptable standards of judicial analysis and reasoning. Rather the lower courts failed to address all key issues concerning the adequacy of Petitioner's pleadings. In a departure

from expectations of a court, these opinions were vitriolic and derisive. The appellate court opinion in particular attempted to superficially discredit and dismiss the factual allegations presented to the court establishing liability under the False Claims Act.

A. The Lower Court's Opinion Is Clear Error As It Ignores The Record Before The Court.

As specified herein, the lower court committed clear error in finding that Petitioner had not and could not state a claim for relief on behalf of the public fisc under the False Claims Act. It could only seek to justify this finding by defiantly disregarding the clear precedents of this Court and statutory language reflecting the Congressional intent of the False Claims Act, as well as 18 U.S.C. § 207 and 31 U.S.C. § 1352. Petitioner pled the bases for Respondent Lockheed's liability with clarity, precision and a compelling specification of detail and supporting documentation. All of this was consistent with the classic principles of pleading established by this Court.

Petitioner's pleadings provided specific details of the fraudulent schemes that Respondent Lockheed, aided and abetted by Principi and other current and former VA officials, employed to obtain the $298 million from the VA and to get contract extensions which the VA otherwise would not have granted. Petitioner does not dispute that Federal Rule of Civil Procedure 9(b) applies to False Claims Act allegations of fraud. Conforming to the letter and the spirit of Rule 9(b), Petitioner described the "who, what, when and where" of the false claims in his Third Amended Complaint and More Definite Statement. Respondent argued to both the district court and the court of appeals that all the complaint alleged was breach of contract—demonstrating that the complaint gave Lockheed enough notice of the conduct it was accused of to fashion this defense. Respondents do not dispute that the VA did not get what it

bargained for, and it is undisputed that the VA paid out $298 million to Respondents. Respondents also do not dispute the hiring of Principi to lobby public officials. Respondents contend that, at the most, their failure to provide what they contracted for—and got paid for—is a routine breach of contract and thus not actionable under the False Claims Act. Respondent's formulation of this argument is *prima facie* evidence that Respondent understands the allegations in the complaint sufficiently well to fashion the breach of contract defense.

Petitioner's complaint also satisfies the requirements of Rule 8 by providing sufficient notice to Respondent. The court of appeals focused on the Rule 8(a) requirement that the complaint contain a short, plain statement of the allegations. Given the complexity, duration and volume of the transactions involved in Lockheed's scheme to defraud the VA through the Lockheed contract, the number of theories of liability under which Petitioner proceeded, and the requirement that Petitioner set out enough details to plead the fraud with particularity, insisting that the complaint be short overlooked the overarching requirement of Rule 8 that a complaint be construed to do simple justice between the parties. The decision below, which essentially ratified the district court's focus on the length of the complaint, conflicts with well settled law in the circuit interpreting these pleading rules. Additionally, it creates an impossible dilemma for relators who must provide enough detail and information to inform defendants of the accusations against them and yet not be too lengthy. If the appellate court decision is allowed to stand, plaintiffs and the courts must decide how long is too long. The Seventh Circuit has held that length is not a reason to dismiss a complaint.

Such clear error, particularly when concurrent with the abuse of discretion discussed herein, constitutes such a departure from the accepted and usual course of judicial proceedings as to require the intervention of this Court.

B. The Lower Court's Opinion Is An Abuse Of Discretion In Failing To Apply Appropriate Legal Standards.

The well settled precedents established by this Court set out a clear test for the sufficiency of a complaint. A complaint may not be dismissed unless it is clear that the complainant can prove no set of facts upon which relief may be granted. Instead of basing its decision on this Court's precedent, the court of appeals based its decision on its perceived need to safeguard the allocation of scarce judicial resources by conserving them for complaints it deemed "more deserving" than Petitioner's. Determining which pleading has more "merit" is a fundamental—and dangerous—subversion of the test for complaint sufficiency. This Court has a substantial stake in upholding interpretation of the federal pleading rules that allegations in a complaint are to be taken as true and inferences are to be drawn in favor of the pleader. By setting the bar much, much higher than this Court has held is appropriate, the court of appeals decision creates a standard which has the potential to discourage litigants from resorting to the courts to redress fraudulent practices. This Court cannot allow the court of appeals to turn litigants such as Petitioner away from the door to the courthouse. To do so is to seriously erode the public confidence in this nation as one governed by the rule of law.

Adopting a new theory, such as the "shotgun pleading theory" advanced in two Eleventh Circuit cases, will not achieve the substantial justice requirement of Rule 8(f). On the contrary, decisions which count paragraphs and pages and rely on esoteric theories of judicial analysis will impede the application of Rule 8, upon which the liberal pleading standard of federal court is based.

C. The Actions Of The Lower Courts Are Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Require The Intervention Of This Court.

The opinion of the Seventh Circuit does not meet minimally acceptable standards of judicial conduct. As set forth above, it fails to appropriately apply the correct legal principles and ignores the plain record before the Court. One of the clearest examples set forth above is the affirmation of the dismissal of the Petitioner's conspiracy count without comment by either the district or appellate court. This occurred notwithstanding that this count fully complied in all respects with classic pleading requirements and prior instructions of the district court. The convergence of abuse of discretion and clear error has had a particularly severe effect in the context of this case which arises from the brutal and prolonged betrayal of public trust by cabinet level officers, other Presidential appointees and the nation's largest government contractor resulting in a loss of in excess of $150 million from the veterans and dependents Congress intended to benefit. This Court must act to bring Respondents' conduct within the reach of the law.

IV. The Writ Should Be Granted Because There Exists Today A Clear And Present Danger To The Public Fisc, Which Can Only Be Averted By Intervention Of This Court.

The two primary parties involved in the conspiracy which defrauded the public fisc of hundred of millions of dollars remain in power today. The former Acting Secretary of the Department at relevant times addressed in this suit is Anthony Principi, who sits today as the current Secretary of the Department of Veterans Affairs. He presides over one of the largest budgets within the Executive Branch. Lockheed Martin remains today the nation's largest government contractor. A refusal by this Court to

intervene will be viewed as a validation of a highly effective protocol for the piracy of public funds. The potential future consequences to the nation's financial well being are disastrous.

The concurrence of two such powerful influences as the involvement of a cabinet ranking official and the nation's largest contractor continue to have a chilling effect on the Government's ability to protect itself other than through the extraordinary private attorney general provisions provided through *qui tam* actions under the False Claims Act. Should this Court now decline to intervene, the likelihood of appropriate remedial action becomes extremely slim. The founding fathers, recognizing the vulnerability of the Executive and Legislative Branches to corrupt influences, created an independent Judiciary within its system of checks and balances. Similarly, Congress recognized that fraud against the nation and its public fisc was so prevalent and pernicious as to overwhelm any probable resources it might marshal. Accordingly, Congress established the private attorney general provisions embodied in the *qui tam* provisions of the False Claims Act. These provisions also were specifically targeted at providing protections to the nation and the public fisc, when the routine resources of the Executive Branch are overwhelmed. This statutory intent cannot be accomplished unless this Court intervenes and holds that the actions of the lower courts are unacceptable.

V. The Writ Should Be Granted To Protect And Preserve The Integrity Of The Country's Reputation For Commitment To Rule Under Law.

Unless this Court intervenes, there will be no consequence for the blatant and prolonged betrayal of public trust by a former cabinet level official, former Presidential appointees and the nation's largest government contractor. There will be an unavoidable tarnish to the nation's reputation as a country

committed to the rule of law where no one stands above the law. Our citizens and taxpayers deserve better.

The nation must not be embarrassed by a blatant demonstration that corruption involving Presidential appointees is an exception to America's commitment to equal justice under the law. During the Watergate scandal, the courage of this Court and Judge John Sirica in ordering the production of the Nixon tapes was recognized by the world as a reaffirmation of the integrity and greatness of the American system of government. *See United States v. Nixon*, 418 U.S. 683 (1974). The federal judiciary, as led by this Court, was widely acclaimed for confirming that in truth and in fact we are a nation where the rule of law prevails and that no one is above the law.

Americans were encouraged that, even though there were betrayals by individuals in high office, in the end the strength of the American system of government prevailed. The wisdom of the founding fathers in establishing the checks and balances of the three branches of government guided the nation to a just outcome. During that time of national crisis, the Judiciary preserved the faith of the American people in our system of government and the reputation of the country in the world community. Only intervention now by this Court can achieve the same outcome.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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